84-6780 (1)

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

WILLIAM ALVIN SMITH,

Petitioner,

-against-

ROBERT O. FRANCIS, WARDEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

1. Does the infliction of capital punishment on a mentally retarded offender for an unpremeditated homicide constitute cruel and unusual punishment?

2. Does it violate due process to instruct the jury in a murder trial that the essential element of malice, incorporating the specific intent to kill, "shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart?"

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OPINIONS BELOW

The opinion of the Supreme Court of Georgia, reported at 325 S.E.2d 362 (1985), is reproduced at Appendix A. The unreported opinion and order of the Superior Court of Butts County, Georgia is reproduced at Appendix B.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on January 29, 1985. Rehearing was denied on February 19, 1985. The notification to counsel that rehearing was denied is reproduced at Appendix C. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3), petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law....

The Georgia malice murder statute in effect at the time of petitioner's trial, Ga. Ann. Code §26-1101(a)(1978), provided in relevant part:

> A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being....Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

STATEMENT OF THE CASE

A. Procedural History

On September 14 and 15, 1981, in the Superior Court of Oglethorpe County, Georgia, petitioner William Alvin Smith was tried on charges of malice murder and armed robbery. He was convicted and sentenced to death. On direct appeal the Supreme Court of Georgia affirmed his convictions and sentence in a decision rendered April 6, 1982. Smith v. State, 249 Ga. 228, 290 S.E.2d 43 (1982). This Court denied certiorari.[1/] Smith v. Georgia, 459 U.S. 882, rehearing denied, 459 U.S. 1060 (1982).

Petitioner then filed his petition for a writ of habeas corpus in the Superior Court of Butts County (Flint Judicial Circuit), Georgia. An evidentiary hearing on this petition was held on March 31, 1983, and the court denied habeas corpus relief on April 19, 1984. The Supreme Court of Georgia affirmed in an opinion dated January 29, 1985, and denied rehearing on February 19, 1985.

B. The Trial

At petitioner's trial, the State presented evidence that on June 8, 1981, petitioner assaulted one Dan Turner with a knife

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1/ The questions presented in petitioner's certiorari petitions filed in this Court in 1982 were not the same as those presented now.

and a hammer in the latter's grocery store, and then stole money from the cash register and Turner's wallet. Turner died later that day, the result of blunt force trauma to the head. See Smith v. State, 290 S.E.2d at 47-48.

Petitioner called two witnesses who testified during the guilt-innocence phase of his trial about his mental retardation.[2/] The first witness, Merrill L. Gay, had been the assistant principal of petitioner's middle school. He testified that petitioner had been placed in the "educable mentally retarded class, meaning slow learner," on the basis of his I.Q. score. (T.T. 273.[3/]) The second witness was Dr. Everett Clark Kuglar, the Superintendent of the Georgia Regional Hospital, and the psychiatrist who had evaluated petitioner pursuant to court order. Dr. Kuglar testified that petitioner was mentally retarded with a full scale I.Q. score of 65 and a mental age of somewhere between ten and eleven years. (T.T. 280-281.) "That is, that the logic, the calculation abilities, planning abilities, the ability to perceive things is roughly that of a youngster in the 10 to 11 year age range." (T.T. 281.) Dr. Kuglar's testimony is reproduced in Appendix D.

Petitioner himself also testified during the guilt-innocence phase of the trial. (T.T. 285-298.) He described his offense as,

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2/ These witnesses testified in connection with an attempted insanity defense.

3/ "T.T." refers to the trial transcript.

in effect, an impulsive act of violence that escalated out of control[4], and testified that he "didn't mean to kill Mr. Dan"[5]. Petitioner's testimony is reproduced in full in Appendix E.

4/ Petitioner's testimony was as follows:

Q. Okay. Now, when you got to Mr. Dan's place, tell the ladies and gentlemen of the jury what happened.

A. Well, I went in there like I always do. I got in the store and he was laying up...You know, sometimes he'd be asleep in the chair, like he always do. And he woke up and he looked at me and he didn't speak to me like he usually do. I asked him for a pack of cigarettes, and he said, "What kind?" I said, "Winstons." So he went to get the cigarettes and, when he retched at the cigarettes, I retched at him and...

Q. Wait a minute. You retched (sic) at him?

A. Yes.

Q. What do you mean by that?

A. You know, when he retched at the cigarettes, I retched at him, you know, just ...Then he, you know, had the hammer and, when he grabbed that hammer, you know, he started forcing his self, you know, and I got carried way.

Q. You got carried away? What did you do?

A. All I know, I was stabbing. That's all. He said something to me, but I don't know what he said.

Q. And then what did you do?

A. Well, he started back to the back and then he fell, and when he fell, the hammer, it fell, too, and I guess I picked the hammer up and hit him with it.)

(T.T. 287; see also T.T. 291-296.)

5/ Petitioner's testimony was as follows:

Q. Do you have any other statements you want to say to the jury?

A. Yes. I didn't mean to kill Mr. Dan and I ain't had nothing against Mr. Dan or nothing, and I'm sorry I did it. I didn't go and tell the Sheriff that. I told myself that when

[Footnote continued next page]

In closing argument after the guilt-innocence phase of the trial, petitioner's counsel argued that petitioner "was so mentally impaired that he did not have the requisite mental intent." (T.T. 316-317.) Based on petitioner's level of retardation and the "absolutely bizarre, totally senseless" nature of the offense (T.T. 314), counsel also sought a verdict of not guilty by reason of insanity.

Petitioner's intent was thus a central issue in the trial. On the question of intent, the court first charged the jury that "a person will not be presumed to act with criminal intention, but you, the jury, may find such intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act or acts for which the accused in this case

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5/ [Footnote Continued]

> I was in the bushes, when I run. I stopped and thought about it and I cried, you know, because it hurt me because Mr. Dan been knowing me and my folks as long as I can remember. And he ain't never said nothing smart or, you know, nothing to us or nothing. He always have been good to me. I can say that. And I have went in there when he was out of the store and waited I don't know how many minutes for him to come back. When he come back, he always, you know, looked at me and ... I remember being there two or three days before this you know, and he was on the outside by the drink machine. And there was some birds and stuff out in the yard, you know, and you know, me and him sat out there and laughed at it for a while. And he asked me about my aunt Florene, the one that stays in Atlanta. Most every time I go up there, he always asks me about my aunt. He knowed my aunt and mama and them when they was little, you know. They used to come in the store. I never intended to kill him. I didn't even intend to touch him. That's all I've got to say.

(T.T. 290.)

is prosecuted." (T.T. 330.) Subsequently, however, the court charged that the essential element of malice, incorporating the specific intent to kill, "shall be implied" from certain circumstances:

> [A] person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate, intentional, unlawfully [sic] to take away the life of a fellow creature which is manifest by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.... Express malice is that of [sic] deliberate intention to take away the life of a fellow creature. Malice would be implied where no considerable provocation appears and all the circumstances of the killing show an abandoned and malignant heart.

(T.T. 335-336; emphasis added.) The court then went on to instruct the jury that premeditation was not required. (T.T. 336.) (The trial court's charge at the conclusion of the guilt-innocence phase of the trial is reproduced in its entirety at Appendix F.)

Following the jury's verdicts of guilty on both counts, a brief sentencing proceeding was held. Petitioner's counsel sought mercy partly on the basis of petitioner's retardation. (T.T. 366-369.) In response to this point, the prosecuting attorney reminded the jury that petitioner had been found "criminally responsible for his act" (a reference to the jury's rejection of petitioner's insanity claim). (T.T. 374.) The trial court's sentencing instructions did not address the significance, if any, of petitioner's mental retardation.

The jury imposed the death penalty.

C. The Appeal

The Georgia Supreme Court affirmed the convictions and death sentence on appeal. In holding the evidence inadequate to support the attempted insanity defense, that Court acknowledged petitioner's retardation. In reviewing the appropriateness of petitioner's sentence, however, the Court did not discuss the possible significance of his mental handicaps.

The Court also did not address the trial court's jury instructions regarding malice and intent to kill.

D. The State Habeas Proceedings

In his petition for a writ of habeas corpus, petitioner challenged his convictions and death sentence on a number of federal constitutional grounds including (1) that he was denied due process by the establishment of a conclusive presumption on the essential element of malice (¶¶ 62-63); and (2) that in light of his mental retardation, the death penalty constituted cruel and unusual punishment (¶¶ 86-89). (The pertinent excerpts from the habeas corpus petition are reproduced in Appendix G.)

At the March 31, 1983, habeas corpus hearing, petitioner introduced the affidavits of twenty-nine witnesses, both lay and expert.[6/] Many of these witnesses described petitioner's mental

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6/ The introduction of evidence by affidavit at a habeas corpus hearing was expressly permitted by Ga. Code Ann. § 50-127(7) (1978).

limitations (which respondent did not contest). The most detailed discussion was contained in the affidavit of Brad Fisher, Ph.D., an experienced clinical and correctional psychologist who had clinically evaluated petitioner for the hearing. (His affidavit is reproduced in Appendix H.)

The evidence at the hearing fully confirmed Dr. Kuglar's trial testimony that petitioner had a mental age of between ten and eleven years. With a full-scale I.Q. of 65, he fell within the bottom 2.2% of the population. (Fisher Affidavit at 17.) Dr. Fisher elaborated on the serious functional consequences of petitioner's mental defects as follows:

> The presence of this level of mental retardation indicates much more than just slow learning; it indicates impaired social judgment, impaired ability to understand or acknowledge the consequences of behavior, impaired ability to make rational judgments, increased dependency features, susceptibility to confusion and anxiety in stressful situations, tendency toward more impulsive behavior (this often based on the condition in which the retarded person has more frequent frustrations with the many situations that are confusing and complex to him or her, without the ability to appropriately vent that frustration) and some diminished capacity to distinguish between right and wrong. This latter category is different from an inability to distinguish between right and wrong that may be the case where the insanity issue is involved. [7/]

7/ The lay witness affidavits corroborated this description. They variously described petitioner as being slow, severely limited and childlike.

(Fisher Affidavit at 11; see also pages 8, 13-14, 16.) Dr. Fisher related these features of petitioner's personality to his offense.[8/]

8/ Dr. Fisher discussed petitioner's offense as follows:

> [T]he following features seem especially noteworthy in his description of situational components in the days surrounding the commission of the crime. First, it should be pointed out that one of the most important people in William's life at this time was his girlfriend. He described her as the first person near his own age who had really cared about him, and this had taken on extraordinary importance in his life. With this in mind, the fact that he had broken up with his girlfriend in the two days previous to the crime appears significant. His own description of this event included his feelings of total frustration and confusion over what to do about the breakup.
>
> A second factor revolves around the destruction of William's car the day before the crime. This automobile was his first material possession of consequence, and a major feature relating to his self-esteem and feelings of self-worth. It should be noted that at the time the car was destroyed he did not have a license, and the car was not paid for. This served to further heighten his level of frustration and resultant confusion because of his inability to deal with that frustration....
>
> If one was to rank the two most important things in William Smith's life, these would probably have been his girlfriend and his car. To have both of these taken away at the same time would have been traumatic for anyone; however, with his primary psychological dynamics including major limitations in his ability to deal with frustration, as well as easily formed frustration and confusion over typical life experiences not confusing to those not mentally retarded, these events take on special significance. For a person with William's level of retardation, it is important to have a simple, straightforward, and consistent foundation upon which to operate. In his case, the two critical ingredients of this somewhat shaky foundation had been removed, which brought into play the limitations connected with his retardation, much more than would have been the case for a person with normal intellectual functioning, frustration tolerance, and ability to not become confused by outside stimuli.

(Fisher Affidavit, pages 8-10.)

The evidence concerning petitioner's retardation and its relation to his offenses was not disputed. The uncontradicted portrait that emerged was of a mentally impaired young man whose retardation had profound behavioral consequences. His offenses were fairly characterized as a tragically impulsive outburst in response to inner turmoil, frustration and confusion beyond his impaired ability to resolve or control.

The habeas court rendered its decision denying relief on April 19, 1984, more than a year after the hearing. The court upheld the malice charge, stating that "the trial court appears to have been very careful to convey to the jury that the State was required to prove each individual element of each crime beyond a reasonable doubt." (Appendix B, page 25.)

The court also rejected petitioner's cruel and unusual punishment claim, predicated on his mental retardation, on the ground that "[t]he [Georgia] Supreme Court has already concluded that Petitioner's death sentence is not excessive or disproportionate." (Appendix B, page 29.)

The Georgia Supreme Court affirmed the habeas court's treatment of these particular claims without further discussion. (Appendix A, page 7.)

REASONS FOR GRANTING THE WRIT

Imposing the death penalty on mentally retarded offenders implicates fundamental principles of Eighth Amendment jurisprudence.

In rejecting petitioner's cruel and unusual punishment claim, the Georgia state courts have decided an important question of federal law which has not been, but which should be, settled by this Court. We discuss this question in Part A, infra.

Instructions in a murder trial that require the jury to "imply" the essential element of malice raise basic due process concerns that this Court has repeatedly addressed, most recently in Francis v. Franklin, 53 L.W. 4495 (April 29, 1985). In upholding those instructions in this case, the Georgia courts have deviated from the principles articulated in Franklin and other applicable decisions of this Court. We examine this issue in Part B, infra.

Certiorari should therefore be granted to resolve both questions presented by this petition, pursuant to Rule 17.1(c) of this Court's Rules.

A. Infliction of Capital Punishment on a Mentally Retarded Offender for an Unpremeditated Homicide Violates Basic Principles of Death Penalty Jurisprudence.

The question in this case is whether the Constitution tolerates imposing the most merciless and irrevocable of punishments on people who, from inherent mental defect, are least able to understand and obey society's strictures.

This Court most recently held a death sentence cruel and unusual in Enmund v. Florida, ___ U.S. ___, 102 S.Ct. 3368, 73 L.Ed 2d 1140 (1982). There the Court held that the death penalty

could not constitutionally be imposed on one who aided and abetted a robbery during which murder was committed by others, if he did not himself kill or intend to kill. Enmund's analysis of the cruel and unusual punishment clause in those circumstances establishes the controlling principles here.

To begin with, the issue is not whether death is a disproportionate penalty for murder, but rather whether it is a valid penalt for the particular offender. 102 S.Ct. at 3378, 73 L.Ed 2d at 1152. "The focus must be on his culpability, ... for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence,' ... which means that we must focus on 'relevant facets of the character and record of the individual offender.'" Id. (citations omitted; emphasis in the original).

Death is a disproportionate punishment for the particular offender in question if the legitimate purposes of capital punishment would not be substantially fostered by its infliction on persons like him. The two legitimate purposes of the death penalty are deterrence of capital crimes by prospective offenders, and retribution. Gregg v. Georgia, 428 U.S. 153, 183 (1976). "Unless the death penalty when applied to those in [the defendant's] position measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." Enmund, 102 S.Ct. at 3377, 73 L.Ed.2d at 1152, quoting Coker v. Georgia, 433 U.S. 584, 592 (1977).

The Court struck down the death penalty in Enmund because neither deterrence nor retribution would have been significantly furthered by its infliction. Regarding deterrence, the Court considered the effect on those similarly situated to Enmund and declared itself "quite unconvinced" that the possibility of capital punishment for vicarious felony murder would deter those who do not contemplate the killing. 102 S.Ct. at 3377, 73 L.Ed. 2d at 1152-1153. The Court quoted with approval Justice Frankfurter's observation in Fisher v. United States, 328 U.S. 463, 484 (1946), that "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation." Id.

The Court also dismissed the notion that retribution could justify Enmund's execution. Retribution, the Court held, must be tailored to the defendant's "personal responsibility and moral guilt." Id., 102 S.Ct. at 3378, 73 L.Ed.2d at 1154. The defendant's mental state is critical to this assessment. Id. Absent the intention to kill, the defendant's culpability would not be so great that his execution would "measurably contribute to the retributive end of insuring that the criminal gets his just desserts." Id.

The application of the foregoing principles to this case requires that petitioner's relevant personal characteristics be identified and described. As in Enmund, the focus must be on petitioner's mental condition and its relation to his offense. Then it is necessary to weigh the efficacy of capital punishment for people like petitioner in achieving the goals of retribution and deterrence.

Petitioner's outstanding characteristic is his unquestioned mental retardation. He functions at the level of a ten to eleven year-old child. He manifests not merely reduced intellectual capacity, but also impaired judgment, limited ability to understand or acknowledge the consequences of his behavior, susceptibility to confusion and anxiety under stress and a tendency toward impulsive behavior and inappropriate responses to frustration. These characteristics were intimately related to his impulsive act of violence in this case.

Application of the death penalty to retardates like petitioner for unpremeditated murder measurably serves neither deterrence nor retribution. As far as deterrence is concerned, retardates' impulsivity and intellectual impairment virtually rule out the kind of fully contemplated crime for which the threat of the death penalty can realistically have a deterrent effect. Cf. Enmund, 102 S.Ct. at 3377-3378, 73 L.Ed 2d at 1152-1153.[9/] Moreover, the retardate's diminished ability to project into the future and rationally contemplate the consequences of his acts further reduces the likelihood that he will appreciate and be restrained by the prospect of punishment, or that he will be influenced by variations in the degree of punishment. See Sternlicht and Deutsch, Personality Development and Social Behavior in the Mentally Retarded

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9/ See also Gregg v. Georgia, 428 U.S. at 185-186, distinguishing "murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect," from those who perpetrate "carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act."

80 (1972); Grigg, Criminal Behavior of Mentally Retarded Adults, 52 Am. J. of Mental Deficiency 370, 371, 374 (1948).

Retribution is an even poorer justification for executing retardates such as petitioner, depending as it does on the degree of their personal culpability. Courts have long recognized in capital cases that the mentally retarded are not to be held to normal standards of accountability. E.g., State v. Hall, 126 Neb. 295, 310, 125 N.W.2d 918, 927 (1964) (reducing death sentence to life imprisonment where defendant had an I.Q. of 64); State v. Behler, 65 Idaho 464, 475-476, 146 P.2d 338, 343 (1944) (sentence of death reduced to life imprisonment because defendant "possesses a very low order of intelligence"); Commonwealth v. Green, 396 Pa. 137, 148, 151 A.2d 241, 247-248 (1959) (death penalty vacated in light of defendant's youth and dull normal intelligence); see also Woods v. State, 241 Ga. 546, 105 S.E.2d 896, 897 (1958) (jury instructed that weakmindedness, though no defense to the crime, may be grounds for recommendation of mercy). In virtually every state with a capital sentencing scheme, mental retardation is recognized to be a mitigating factor in sentencing.

The complex of reasons why retardates are inherently less responsible than ordinary people for their antisocial behavior is summarized in Dr. Fisher's affidavit. His description of the mentally retarded person's handicaps and impaired impulse control is strongly supported in the literature. On the retardate's special proneness to act immediately and violently to the urges of the

moment, see, e.g., Bromberg, The Mold of Murder 202 (1961) (tendency of retardates to "react in a blinding flash of vengeance" against frustration and humiliation); Glueck, Mental Disorder and the Law 334-335 (1925) (retardate's defective control of instinctive behavior may lead to serious crimes of violence); Sternlicht and Deutsch, supra at 58 (failure of defense mechanisms of repression and inhibition impair retardates' ability to control aggressive and hostile impulses). As the last-named authors state,

> [The] retarded individual is especially prone to committing deviant acts because he will be subject to weak and ineffective functioning not only in the realm of conscience and values but in the realm of judgment and common sense as well. It is the latter deficit, in fact, which creates perhaps the more immediate and pervasive of the retardate's problems in the area of deviant and antisocial conduct.

Id., at 81. See also Tredgold and Soddy, Textbook of Mental Deficiency 252 (10th ed. 1963) (retardate may evince an understanding of the "nature" of the act -- that it is forbidden -- without fully understanding its "quality").

In short, the infliction of the death penalty on mentally retarded offenders such as petitioner does not serve either of the two recognized purposes of capital punishment. It is therefore "nothing more than the purposeless and needless imposition of pain and suffering," Coker v. Georgia, 433 U.S. at 592, which the Eighth and Fourteenth Amendments forbid.

B. The Jury Instructions Regarding Malice and Intent Did Not Comport with Due Process of Law

In Francis v. Franklin, supra, this Court recently reiterated that due process "prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime." 53 L.W. at 4497. A mandatory presumption, whether conclusive or rebuttable, of one essential element upon proof of other elements is therefore unconstitutional. Id. See also Sandstrom v. Montana, 442 U.S. 510, 520-524 (1979); Patterson v. New York, 432 U.S. 197, 215 (1977); Mullaney v. Wilbur 421 U.S. 684, 698-701 (1975).

Malice, incorporating an intent to kill[10/] (as well as an absence of provocation), was an essential element of the offense of murder with which petitioner was charged. Ga. Code Ann. § 26-1101 (1978). The court instructed petitioner's jury, however, that there were two forms of the essential element of malice, "express" and "implied." While express malice meant that the homicide was "deliberate" and "intentional," petitioner's jury was not required to find such malice. Instead the trial court instructed that "[m]alice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart." (T.T. at 336; emphasis added.) Petitioner's

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10/ Intent to kill is an element of the offense of malice murder in Georgia. See Patterson v. State, 239 Ga. 409, 416-417, 238 S.E.2d 2, 8 (1977).

jury could quite reasonably have understood this instruction unconstitutionally to signify either that no finding of the requisite intent to kill was required at all, or that such intent was conclusively presumed, where the circumstances of the killing were sufficiently aggravated.

The state habeas court found no due process violation in the context of the overall charge because "the trial court appears to have been very careful to convey to the jury that the State was required to prove each individual element of each crime beyond a reasonable doubt. (T.T. 326, 327, 330, 339)." The habeas court concluded that therefore no reasonable juror "would infer a burden on Petitioner to prove a lack of malice given the trial court's instructions as a whole." (Appendix B at page 25.) But this reasoning does not withstand analysis in light of this Court's recent opinion in Franklin.

There this Court emphasized that "general instructions on the State's burden of persuasion and the defendant's presumption of innocence are not 'rhetorically inconsistent with a conclusive or burden-shifting presumption,' because '[t]he jury could have interpreted the two sets of instructions as indicating that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied.'" 53 L.W. at 4499.

Nor was the jury charge in petitioner's case saved by the instruction that "a person will not be presumed to act with criminal intention, but you, the jury, may find such intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act or acts for which the accused

in this case is prosecuted." This Court held the very same instruction to be a wholly inadequate corrective in Franklin, 53 L.W. at 4499-4500.

This Court has not resolved whether an unconstitutional burden-shifting charge can ever be harmless. See Connecticut v. Johnson, 460 U.S. 73 (1983). It was not clearly harmless in petitioner's case, however, because his trial testimony, if credited by the jury, would have justified it in retaining a reasonable doubt about his intent.

Petitioner testified that he "didn't mean to kill Mr. Dan." (T.T. 290.) His counsel argued lack of intent to the jury in his summation. (T.T. 309, 316-317.) Petitioner's version of his offense was that he entered Turner's store, asked for cigarettes, and impulsively grabbed Turner when Turner started to get them.[11/] (T.T. 287.) According to petitioner, Turner then "had the hammer and, when he grabbed that hammer, you know, he started forcing his self, you know, and I got carried away." (T.T. 287.) Only after Turner displayed the hammer "and he was forcing me" (T.T. at 291), petitioner said, did he pull out his knife and stab Turner. (T.T. 292.) When Turner fell and dropped the hammer, petitioner, still "carried away," picked it up and hit Turner with it. (T.T. 287.) This happened after petitioner's knife had broken and cut petitioner's own hand. (T.T. 294.) Petitioner's protestation that he did not intend to kill Turner was rendered substantially more credible by the evidence that he was mentally retarded.

11/ Petitioner steadfastly denied that he was attempting to rob Turner. (T.T. 288,292, 296-297.)

Petitioner's testimony, if credited by the jury, would have justified it in finding an absence of malice because petitioner did not have the deliberate intention to kill. But if the jury followed the trial court's instruction, it may have taken the easy way out and implied malice without undertaking "the more difficult task" of evaluating the evidence on intent. Sandstrom v. Montana, 442 U.S. at 526 n. 13. Because this possibility cannot be ruled out, the due process error cannot be deemed harmless, and petitioner's conviction of malice murder cannot stand.

CONCLUSION

For the reasons stated, this Court should issue the requested writ of certiorari.

Respectfully submitted,



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In the Supreme Court of Georgia

Decided: JAN 29 1985

41276, 41504. SMITH v. FRANCIS, Warden.

HILL, Chief Justice.

William Alvin Smith was convicted of the murder and armed robbery of Daniel Turner and sentenced to death. Smith v. State, 249 Ga. 228 (290 SE2d 43) (1982), cert. denied, 103 SC 182 (1982). This is his appeal from the denial of habeas corpus.

In his original petition ior habeas corpus, Smith raised 14 grounds. Following a hearing, the habeas court issued a lengthy order finding the applicable facts and deciding each point raised. Smith then filed an application for a certificate of probable cause to appeal, raising 14 enumerations of error. This court granted the application to appeal, which brings the entire case before this court.[1]

1. In granting this application, the court was particularly interested in Smith's numerous allegations that he had been denied effective assistance of counsel. Having reviewed the transcript of the original trial as well as that of the hearing in this habeas case, we have concluded that those allegations are unfounded.

In Strickland v. Washington, U. S. (104 SC 2052, 80 LE2d 674) (1984), the Supreme Court set forth the standards for judging a defendant's contention that the Sixth Amendment requires a conviction or death sentence to be set aside because of actual ineffective assistance of counsel at trial or sentencing.[2] The standards adopted apply to trials of criminal cases and to death penalty sentencing proceedings, but not to sentencing in other criminal cases. The Court set forth a two step test, saying

(104 SC at 2064): "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." The Court emphasized that the burden is on the defendant to make both showings, and that a reviewing court could find lack of sufficient prejudice without deciding whether counsel's performance was deficient (104 SC at 2069-70).

Concerning counsel's performance, the Court noted that all federal courts of appeal and most state courts have adopted the "reasonably effective assistance" standard, as Georgia has,[3] and approved it (104 SC at 2064). The Court went on to note that the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances, and stated that every effort must be made to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective at the time (104 SC at 1065). The Court also pointed out that a reviewing court should recognize that counsel is entitled to a "strong presumption" (which the defendant must overcome) that counsel's conduct falls within the wide range of reasonable professional conduct and that all significant decisions were made in the exercise of reasonable professional judgment (104 SC at 2066).

Concerning the prejudice component, the Court held that the defendant must show that there is a reasonable probability (i.e., a probability sufficient to undermine confidence in the outcome) that, but for counsel's unprofessional errors, the result of the proceeding would have been different (104 SC at 2068). Regarding death penalties, the question is whether there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did

not warrant death (104 SC at 2069).

Applying the foregoing standards we find that Smith has failed to show that he was not provided reasonably effective assistance of counsel considering all the circumstances.[4] We find further that Smith has failed to show that there is a reasonable probability sufficient to undermine confidence in the outcome that, but for counsel's alleged unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, supra.

In reaching these conclusions we have undertaken to evaluate counsel's conduct from his perspective at the time of trial. For example, the defendant elected to plead not guilty to the charges of murder and armed robbery, and it was counsel's duty to provide assistance to him in the guilt-innocence as well as the sentencing phase of the trial. Defendant is now critical of his counsel for, inter alia, having asserted an unfounded defense of insanity, but faced with a not guilty plea, a confession and a witness who arrived during commission of the crimes who knew (and hence could positively identify) the defendant, Smith v. State, supra, 249 Ga. at 233-234, counsel's choice of the insanity defense (as opposed to alibi, self defense, coercion, etc.) was reasonable under the circumstances.

The habeas court did not err in denying relief upon this ground.

2. At oral argument in this court, Smith's attorneys focused their attention on his contention that in instructing the jury during the sentencing phase the trial court erred by failing to explain what mitigating circumstances are, and their function in the jury's deliberations.

At defendant's trial, the court commenced the sentencing phase by informing the jury as follows:

"Now, ladies and gentlemen of the jury, the defendant in this case, William Alvin Smith, has been found guilty of the offense of murder and it now becomes your duty to determine,

within the limits prescribed by law, what penalty shall be imposed for this offense. The Court will impose the penalty for the armed robery and you will impose the penalty for the offense of murder.

"The law provides that when a person is found guilty in such a case, in which the State is demanding the death penalty and in which the death penalty may be imposed, it is the duty of the presiding Judge to hold a second phase of the trial and to offer the State an opportunity to present evidence in aggravation of the punishment and the accused an opportunity to present evidence in extenuation and in mitigation of punishment. We are now in that phase of the trial. . . ."

After the introduction of evidence during the sentencing phase and after argument of counsel, the court instructed the jury in pertinent part as follows:

"Now, ladies and gentlemen of the jury, you should consider all of the evidence, both the evidence submitted during the sentence phase, as well as the evidence submitted at the prior phase of this trial, in arriving at your verdict as to the sentence to be imposed. This includes any evidence of mitigating circumstances received by you in this case.

"Ladies and gentlemen of the jury, even if you find beyond a reasonable doubt that the state has proved the existence of aggravating circumstances in this case which would justify under the law the imposition of a death sentence, you are not required to recommend that the accused be put to death. You would be authorized under these circumstances to recommend the death penalty, but you are not required to do so. The sentence to be imposed in this case is a matter entirely within your discretion and you may provide for a life sentence for this accused for any reason that is satisfactory to you or without any reason if you care to do so. The law vests the exclusive right with the

jury to either make or withhold a recommendation for the death penalty."[5]

Smith contends that this charge does not meet the requirements set out in Spivey v. Zant, 661 F2d 464, 471 (5th Cir. Unit B 1981), cert. denied, 102 SC 3495 (1982), and its progeny.[6] In Spivey the court found that in death penalty cases the jury must receive clear instructions which not only do not preclude consideration of mitigating factors, but which also guide and focus the jury's objective consideration of the particularized circumstances of the individual offense and the offender. The court went on to say (661 F2d at 471): "In most cases, this will mean that the judge must clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend against death; in order to do so, the judge will normally tell the jury what a mitigating circumstance is and what its function is in the jury's sentencing deliberations."

In Spivey, the court's sentencing instructions did not use the word "mitigation" and, hence, did not inform the jury that it should consider evidence of mitigating circumstances. Moreover, the court did not inform the jury that even if it found the existence of aggravating circumstances, the jury could decide not to impose the death penalty. Thus, the instructions in the case before us are not the same as in Spivey.

More importantly, as the United States Supreme Court noted in Zant v. Stephens, U. S. (103 SC , 77 LE2d 235, 247-248) (1983): "In Georgia, unlike some other States, the jury is not instructed to . . . balance aggravating against mitigating circumstances pursuant to any special standard." The Court went on to observe: "Georgia's scheme includes two important features which the plurality [in Gregg v. Georgia, 428 U. S. 153 (96 SC 2909, 49 LE2d 859) (1976)] described in its general discussion of sentencing procedures that would guide and channel the

exercise of discretion. Georgia has a bifurcated procedure, see id., at 190-191, 49 LE2d 859, 96 SC 2909, and its statute also mandates meaningful appellate review of every death sentence, see id., at 195, 49 LE2d 859, 96 SC 2909. The statute does not, however, follow the Model Penal Code's recommendation that the jury's discretion in weighing aggravating and mitigating circumstances against each other should be governed by specific standards."

Rejecting Stephens' argument because it would necessitate overruling Gregg v. Georgia, the Court said (77 LE2d at 249): "For the Court approved Georgia's capital sentencing statute even though it clearly did not channel the jury's discretion by enunciating specific standards to guide the jury's consideration of aggravating and mitigating circumstances." The Court concluded, saying (77 LE2d at 258) that ". . . the Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances, and Georgia has not adopted such a system."

Although the Stephens opinion involved a different issue and hence is not authority for our holding here, we find it persuasive that the U. S. Supreme Court does not require that a jury in Georgia be instructed as to specific standards for weighing aggravating and mitigating circumstances (i.e., the jury need not be instructed as to the function of mitigating circumstances), so long as the jury is allowed and instructed to consider any evidence in mitigation and is instructed, as here, that it has the discretion, notwithstanding proof of aggravating circumstances, to sentence the defendant to life in prison for any reason satisfactory to the jury or without any reason.[7]

As the U. S. Supreme Court noted in Zant v. Stephens, supra, Georgia, unlike some other states, does not require juries to balance aggravating against mitigating circumstances pursuant to any standard. In Georgia, juries may

withhold the death penalty for any reason, or without any reason, and the jury was so instructed here.[8] Hence, the need for instruction as to the nature and function of mitigating circumstances is greatly diminished in Georgia. For these reasons, we do not find the charge in issue here to have been erroneous. Smith v. State, supra; Cape v. State, 246 Ga. 520 (9) (272 SE2d 487) (1980).

3. The order entered by the habeas court discusses each of the remaining issues raised by Smith. We affirm the conclusion of that court that none of them merit relief.

Judgment affirmed. All the Justices concur.

ENDNOTES

[1] After Smith's first application to appeal was granted, the habeas court entered an order overruling Smith's motion to amend his original petition to add an additional ground. Smith's application for a certificate of probable cause as to that order was granted and that appeal was consolidated with his earlier appeal. The issue Smith belatedly sought to raise--that it was error for the trial court not to instruct the jury during the sentencing phase that it could specify that any life sentences imposed be served consecutively--has been decided adversely to him. Ingram v. State, Ga. (16) (Case No. 41100, decided November 27, 1984); Spivey v. State, 253 Ga. 187 (5) (319 SE2d 420) (1984).

[2] "Actual" ineffective assistance of counsel excludes cases involving actual or constructive denial of the assistance of counsel altogether, and state interference with the ability of counsel to render effective assistance. The Court also excluded cases involving assistance of counsel rendered ineffective by a conflict of interest. 104 SC at 2062.

[3] Pitts v. Glass, 231 Ga. 638 (203 SE2d 515) (1974).

[4] Because the habeas court has written a lengthy order treating alleged instances of ineffectiveness in detail, we find it unnecesary to repeat all the facts and contentions here. We do note, however, that contrary to a statement in the order, no witnesses as to Smith's "mental level" were presented during the sentencing phase.

[5] Other instructions by the court made it clear to the jury that it could not impose the death penalty unless it found the existence of a statutory aggravating circumstance beyond a reasonable doubt.

[6] Westbrook v. Zant, 704 F2d 1487 (11th Cir. 1983); Finney v. Zant, 709 F2d 643 (11th Cir. 1983); Morgan v. Zant, 743 F2d 775 (11th Cir. 1984).

[7] Compare Morgan v. Zant, supra (fn 6), 743 F2d at 779).

[8] As Justice Stewart, writing the plurality opinion in Gregg v. Georgia, 428 U. S. 153, 199 (96 SC 2909, 49 LE2d 859) (1976), said: "Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." See also Connor v. State, 251 Ga. 113, 119 (303 SE2d 266) (1983).

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

WILLIAM ALVIN SMITH,	:	
	:	
PETITIONER	:	
	:	HABEAS CORPUS
VS.	:	CASE NO. 5804
	:	
ROBERT O. FRANCIS, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,	:	
	:	
RESPONDENT	:	

O R D E R

This habeas corpus challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Oglethorpe County. Petitioner was convicted of armed robbery and murder. He was sentenced to life imprisonment for the armed robbery and to death for the murder which the jury found to be outrageously and wantonly vile, horrible and inhuman in that the murder involved torture, depravity of mind and aggravated battery to the victim.

Petitioner's convictions and sentences were affirmed on direct appeal. Smith v. State, 249 Ga. 228 (1982). The United States Supreme Court denied certiorari. Smith v. Georgia, ___ U.S. ___, 74 L.Ed 2d 148 (1982). A petition for rehearing was also denied on November 29, 1982. Petitioner now comes before this Court on his first state habeas corpus petition.

The petition contains 106 numbered paragraphs, of which 86 allege substantive claims for relief (20 - 105). These will be addressed numerically corresponding to major topical areas and by related allegations within the broader category.

Filed April 16 1984 at 2:30 P.M.
Donald P. Rahauser
Clerk, Butts Superior Court

The record in this case consists of the transcript of proceedings before this Court on March 31, 1983, and the record and transcript of Petitioner's trial in Oglethorpe Superior Court.

20-43

In paragraphs 20-43, Petitioner alleges that the attorney, Floyd Keeble, who represented him at his trial and on direct appeal, failed to render reasonably effective assistance during and after the trial and that, as a result, Petitioner's conviction and sentence of death were obtained and affirmed on appeal in violation of Petitioner's rights as guaranteed by Sections 2-101 and 2-111 of the Georgia Constitution, and by the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

FINDINGS OF FACT

Floyd Keeble, the Petitioner's attorney during both his trial and on appeal, had practiced law for approximately eleven years at the time he was appointed to represent the Petitioner. (H.T. 48). He had been a full time Public Defender for the Northern Judicial Circuit of Georgia since May of 1976. (Id.) Mr. Keeble had tried 16 or 17 murder cases (H.T. 48), and defended five capital cases. (Id.)

Counsel was officially appointed to the case on June 10th, two days after the offense occurred on June 8, 1981. (H.T. 59). He had been notified of Petitioner's arrest on the morning of June 9th (H.T. 61). An investigator was utilized to track down all possible leads, a task which was estimated to have taken several hundred hours (H.T. 50). Mr. Keeble himself went to Lexington to a family gathering in an attempt to get character witnesses for the Petitioner (H.T. 121). He spent

2-1/2 - 3 hours, had lunch and spoke to about forty people in this effort. (H.T. 126). At this time no one came forth to speak for the Petitioner. (H.T. 128). He did obtain the name of Petitioner's girlfriend, but did not find her at home (H.T. 129). The father of the Petitioner was not, at that time, willing to say that his son was acting strangely. (H.T. 130).

Mr. Keeble did legal research on this case (H.T. 66-68) and was prepared for trial. (H.T. 50, R. 70). Even though a continuance was requested (R. 69) there is no evidence that preparation was not made, simply that some additional time could be used as is often the case.

Counsel stated at the habeas hearing that he felt there was no question that the offense had been committed and that Petitioner was the actor. (H.T. 69). His main concern was with sentencing (H.T. 69). It was with this in mind that he followed the only defense which he felt was plausible (H.T. 81); Mr. Keeble argued in both the guilt/innocence and sentencing phases of the trial that the Petitioner was not sane at the time of the crime. (H.T. 69).

Mr. Keeble showed himself well aware of the requirements for an insanity defense at the habeas hearing. He knew the proper tests for insanity including both the right-wrong and delusions tests. (H.T. 71). He appeared well versed in the need for and use of experts in developing an insanity defense. (H.T. 73-77). He also knew about the need for other evidence. (H.T. 78). All of the areas necessary for a good insanity defense were covered by Mr. Keeble in Petitioner's trial. He had the Court order a mental evaluation (H.T. 79), and discussed the case with the doctors involved (H.T. 104-105). He decided, even though the testimony was not perfect, that it

would be best to utilize the experts as a means of getting the Petitioner's mental condition into evidence. Several witnesses testified as to Petitioner's mental level during the guilt/innocence phase of the trial (T.T. 208, 276), and others were used during the sentencing phase. (T.T. 132). The time at which to introduce a specific witness would, without question, be a tactical decision to be made by the individual lawyer involved. As Mr. Keeble was aware, all evidence placed before the jury could be mitigating no matter which phase of the trial was in progress at the time of introduction, and would thus be available for use by the jury in reaching a decision as to sentencing (H.T. 205) (See Berryhill v. State, 249 Ga. 442 (1982); Eberhart v. State, 232 Ga. 247 (1974)).

Also in selecting witnesses and deciding what evidence to present, Mr. Keeble testified that he did not introduce a number of potential witnesses, such as fellow employees, for fear that, by introducing good character evidence, the door would be opened for the State to introduce counter-evidence including Petitioner's prior conviction. (H.T. 152).

Regarding the Petitioner's ability both to aid in preparation of his case and to take the stand in his own defense, Counsel again seems to have been aware of the possible advantages and drawbacks and to have weighed all factors prior to reaching a decision. He testified at the habeas hearing that he knew of Petitioner's mental limitations, but felt that Petitioner was well aware of his associates and friends. (H.T. 144). He also stated that he had prepared Petitioner for his testimony on the witness stand, and that he had him take the stand to show the remorse which Petitioner had demonstrated previously. He testified that he was taken totally by surprise at Petitioner's testimony and lack of remorse. (H.T. 51-52).

In dealing with pre-trial publicity and prejudice against Petitioner, Mr. Keeble testified that his investigator checked for inflammatory remarks and allegations in the local paper, and that they had no knowledge of any such article. (H.T. 54). He remembered only one factual article which appeared, not in the local paper, but in that of the adjoining county of Clarke. (H.T. 54).

CONCLUSIONS OF LAW

The decisions on which witnesses to call, whether and how to conduct cross-examinations, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client. Reid v. State, 235 Ga. 378 (1975). The Sixth Amendment right to counsel means "...not errorless, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." MacKenna v. Ellis, 280 F.2d 592 (5 Cir. 1960); Fortson v. State, 240 Ga. 5 (1977); Pitts v. Glass, 231 Ga. 638 (1974).

Counsel in this case has, without question, met this test. He employed an investigator to follow up leads (H.T. 68), went to Petitioner's hometown and met with a number of family members and neighbors (H.T. 121), prepared what to him appeared the only plausible line of defense (H.T. 81) and vigorously defended his client. He conferred with Petitioner (H.T. 51) and made the strategic decisions necessary to present his case in the manner he felt would be most effective.

In Paragraphs 21 and 22, Petitioner contends Counsel, on at least two occasions, admitted his own incompetence. Mr. Keeble's oral motion for a continuance (R. 70) to have more

time to investigate has been twisted by Petitioner into an admission of incompetence. The Court specifically asked Counsel if he could proceed and present the Petitioner's case and received an affirmative response prior to denying the motion. (R. 70). There is no evidence that Mr. Keeble did not speak truthfully in replying that he could proceed despite Petitioner's allegations to the contrary.

Petitioner also asserts that Counsel admitted his own incompetence in his Motion to Challenge the Constitutionality of the Unified Appeal. (R. 135). The statement made by Counsel has been pulled out of context by Petitioner. Paragraph (4) of the Motion states that: "The attorney is not competent to assess the multitude of rights and procedures listed in the Unified Appeal GIVEN THE LIMITED RESOURCES AVAILABLE TO AN INDIGENT IN A DEATH PENALTY CASE." The paragraph goes on with general statements about attorneys for AN indigent. The Court interprets this as an effort to attack the Unified Appeals Process on the basis of funds available, not as an admission of incompetence.

In Paragraphs 23, 24, and 33(a-c), Petitioner contends Counsel was ineffective in various ways regarding the witnesses used to present evidence as to Petitioner's mental state. Among the problems alleged were the failure to interview family, neighbors, school personnel and co-workers and to utilize their testimony as mitigating evidence relating to Petitioner's mental retardation (P 24), failure to obtain an independent expert (P 23, 33(a)), failure to obtain existing psychological evaluations (P 33(b)) and failure to present witnesses as to Petitioner's mental state during the guilt/innocence phase of the trial. (P 33(c)).

The choice of what witnesses to use and when to present them is a matter of trial tactics and strategy. Reid v. State, 235 Ga. 378 (1975). Here Counsel interviewed a number of potential

witnesses, many of whom , including Petitioner's father, were not willing at the time to testify for Petitioner. (H.T. 56, 128, 130). He had the Court order a mental evaluation. (H.T. 79). With this current evaluation specifically geared to investigating Petitioner's mental state in relation to the crime committed, there was no reason to think that an evaluation done in school several years prior to the crime would add anything. Counsel was also limited as to funds since he was an appointed attorney representing an indigent Defendant. Counsel interviewed many people and presented a number of witnesses including three during the sentencing phase; (H.T. 132), however, he stated at the habeas hearing that he was careful as to the witnesses and testimony he selected because once the door was opened by his presentation of good character evidence, the State would have countered with testimony of Petitioner's prior conviction for burglary and his time served. (H.T. 152-153). Again this would have been a tactical decision on the part of the attorney.

Petitioner contends in Paragraph 33(d) that his trial counsel used a legally irrelevant argument in presenting his insanity defense, and that there was no evidence presented in support of a proper insanity defense - either the ability to distinguish right from wrong or the existence of insane delusions - and that no proper insanity argument was presented in the closing. While the right/wrong and insane delusions tests are the proper tests for legal insanity in Georgia (Roberts v. State, 3 Ga. 310 (1847)), the basis upon which Counsel's defense was founded that "no sober, sane man in the possession of his normal faculties would have done what this man did, in the circumstance under which he did it, and in

the manner in which he did it", states a correct principle of law. Brown v. State, 228 Ga. 215, 219-220 (1971); Wilson v. State, 9 Ga. App. 274, 281-282 (1911). Counsel developed his theory with evidence of Petitioner's mental condition and through witnesses' testimony about Petitioner's bizarre behavior around the time of the crime. (T.T. 351-352, 357-358, 360). The bizarre nature of the crime was argued in closing to the jury (T.T. 309-310, 314) and the judge charged thereon. (T.T. 338). Counsel's defense was a valid argument and was adequately prepared and presented. He demonstrated at the habeas hearing that he was well-versed in the various aspects of an insanity defense. (H.T. 69-110). He knew the proper tests for insanity (H.T. 71), and he knew how to prepare an insanity defense. (H.T. 73). The fact that he chose one route, which was legally sound, as a basis for his defense rather than another is again a matter of trial tactics. Effectiveness is not measured by how another lawyer might have handled the case. Estes v. Perkins, 225 Ga. 268 (1969).

Petitioner alleges, in paragraph 32, that Counsel allowed him to take the stand even though Counsel knew he was unprepared, could only admit to having committed the murder and had nothing to say of benefit to his defense. Mr. Keeble stated unequivocally that he talked with Petitioner about his taking the stand and prepared him for the testimony to be given. (H.T. 51). Counsel further stated that he wanted Petitioner to testify to demonstrate to the jury the remorse which Petitioner had previously shown in discussing the murder. (H.T. 51). The obvious hope was to appeal to the jurors' sympathy and demonstrate that Petitioner had no intention of killing the victim. Petitioner's testimony gives no indication that he was reluctant to testify. (T.T. 285-299). To the contrary, the general tone is one of willingness,

cooperation and even a desire to speak. Not only were direct questions answered, but Petitioner gave a rather lengthy narrative as to his intentions when asked if he wanted to say anything to the jury. (T.T. 290). From the responses given, Petitioner appears to have been well prepared. His admission of the crime was not any more prejudicial than his earlier confession to the sheriff. The purpose of his taking the stand was not alibi, but to mitigate the impact of the crime by demonstrating his limitations and lack on intent to kill the victim. The Court finds no merit to these allegations.

In Paragraphs 26 and 27, Petitioner alleges various instances of ineffective assistance by Counsel arising out of the failure of Counsel to move for a change of venue because of community hostility (P 26) and the fact that many of the jurors knew the deceased (P 27). This issue has been dealt with briefly in this Order under Paragraphs 59-61, (p. 23), but will be covered here in more depth.

To the best of his knowledge, Counsel could remember only one article on the incident which appeared, not in the local paper, but in the newspaper for the adjoining county. (H.T. 54). He had no knowledge of any article in any local paper. (H.T. 54). His investigator checked for and found no indication of any inflammatory remarks or allegations. (H.T. 54). Furthermore, Counsel himself indicated that he talked with a number of people in his area, many of whom he knew personally and felt would speak to him freely. (H.T. 190). He stated that he detected no more hostility toward Petitioner than in any murder case he had tried. (H.T. 195). The Georgia Supreme Court has said that a change of venue motion based on three newspaper reports and the "small town syndrome" argument that everybody in town knew everything that was going on where no juror was excused for

prejudice and the newspaper articles were factual in nature failed to show the necessary "pattern of deep and bitter prejudice" within the community required to grant such a motion. Cunningham v. State, 248 Ga. 558, 562 (1981). Petitioner's argument is similarly based except that in his case there was only one newspaper article. There is no evidence in the record to demonstrate the widespread adverse pretrial publicity which would cause jurors to be unable to lay aside their opinions and render an impartial verdict as required under Georgia law. Nelson v. State, 247 Ga. 172 (1981). Although some jurors knew the deceased, most indicated they simply knew who he was (T.T. 25-26, 37, 51, 64-65, 75-76), and a number of jurors indicated they also knew the Petitioner. (T.T. 24-25, 35-36, 48-49, 64, 75). All jurors indicated that their familiarity with the individuals involved would not interfere with their making a fair, unbiased decision. (H.T. 16). Petitioner has presented no evidence to show a deep-rooted prejudice which Counsel failed to discover or ignored in not making a motion for change of venue. Counsel had talked with people and gotten a feel for the amount of hostility present, and decided there were no grounds for a change of venue. (H.T. 196). From the evidence in the record he decided correctly. The Court finds no merit to these allegations.

In Paragraphs 28, 30, and 31, Petitioner alleges Counsel failed to properly voir dire the jury to identify those jurors unlikely to recommend against the death penalty (P 28) and to discover prejudices against blacks (P 30) or mentally retarded persons. (P 31).

Counsel testified that the Witherspoon issue was his main concern. (H.T. 200). He asked questions concerning background, children, relation to law enforcement personnel, whether prospective jurors had ever been the victim of a crime and whether Petitioner's

being black would affect their impartiality (see T.T. 62-72 for sample questions). Such questions would be asked in an effort to determine how various evidence in the trial would affect the individual juror. Counsel stated that his reason for not asking directly about racial prejudice was because he had never had a juror admit to it. (H.T. 200). He felt that the best way to uncover racial prejudice was to ask background questions, which he had done. (H.T. 2-0, 209). There is no evidence in the transcript of any juror who would be so adamantly in favor of the death penalty that the Court's instructions could not be followed. Nor is there any evidence of such prejudices against blacks or the mentally handicapped as would be necessary to show the failure to question the prospective jurors on those areas specifically caused Petitioner to be ineffectively represented by Counsel.

In Paragraph 29, Petitioner alleges that Mr. Keeble erroneously allowed a prospective juror to be excused under the Witherspoon standard. The Court has fully developed this issue in this Order under Paragraphs 52-58 (p. 21-22). The juror was found to have been properly excluded under the Witherspoon test. Furthermore, even though Mr. Monk, the juror in question, was excludable under Witherspoon, Counsel did raise objection to his being excused and requested that he be allowed to remain as being part of a "representative cross-section" of Petitioner's peers. (T.T. 116-117). The Court finds that Counsel was not ineffective in allowing the prospective juror to be excused and that, in fact, everything possible was done under the circumstances to try to prevent his being excluded. The Court therefore finds no merit in the allegation of Paragraph 29.

In Paragraph 25 Petitioner alleges that his trial counsel was incompetent in his efforts to suppress Petitioner's confession.

The basis for Petitioner's argument is the lack of a knowing, voluntary and intelligent waiver of his right to remain silent because of his mental limitations and the circumstances of his arrest. As this Court has already reviewed the confession and found it to be voluntary (see Pingings on Paragraphs 44-51, pp.17-and the arguments to the contrary to be unsupported, it follows that Counsel could not have been incompetent in failing to raise this claim.

In Paragraph 25(a), Petitioner argues that Counsel was incompetent in failing to object to the swearing in of the jurors for voir dire by the prosecutor. As Counsel has stated, he is from the area where this trial took place, knew many of the people in the area and had talked with many of them to get a feeling as to the attitude of the community toward his client. (H.T. 190). It is often a tactical maneuver to object or not object. It could well be that, knowing the community, Counsel felt that an objection would do more harm than good to his client. There is no evidence put forth by Petitioner to show any actual and substantial disadvantage to the conduct of his defense by Counsel's failure to object as required. Washington v. Strickland, 693 F.2d 1243 (1982). Where no objection is made, reversal is not required. Gober v. State, 247 Ga. 652 (1981); Gilreath v. State, 247 Ga. 814 (1981); Altman v. State, 156 Ga. App. 185(10)(1980). The Court finds no merit in this allegation.

Petitioner alleges in Paragraph 34 that trial Counsel was ineffective for failing to object to the Court's malice instruction given during the guilt/innocence phase which, was, on its face, unconstitutional because it established a conclusive presumption against Petitioner of an essential element and thereby shifted the burden of proof from the State. The

Court has dealt with this allegation in detail in the section of this Order dealing with Paragraphs 62-63 (p. 23-25). Since no unconstitutional burden-shifting can be found, Counsel cannot be found ineffective for failing to object to the charge.

In Paragraphs 40 and 41, Petitioner alleges Counsel was ineffective in not objecting to the Court's failure to explain mitigating circumstances and to the instruction given on aggravating circumstances. (See this Order ¶ 71-74, 75-82, p. 27, 28). The Supreme Court dealt with the Trial Court's handling of the "mitigating circumstance" charge. Smith v. State, 249 Ga. 228, 299 (1982). They concluded that the charge concerning mitigation was not improper nor was it subject to the deficiencies discussed in Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981). Smith, supra. They also concluded that the evidence substantiated the finding of the (b)(7) aggravating circumstances (Smith v. State, 249 Ga. 228, 234 (1982)), thereby implicitly finding the jury was properly guided. Again, if the instructions are not found to be improper, Counsel cannot be ineffective for failing to have objected to them. Accordingly, these allegations are found to be without merit.

In Paragraph 39, Petitioner alleges Counsel was ineffective for failing to submit to the Court instructions on mitigating circumstances to be given following the sentencing phase of the trial. The jury was instructed by the trial court during this phase to consider all evidence including any evidence of mitigating circumstances. (T.T. 378). As previously stated, the Georgia Supreme Court has already found the instruction on mitigation given in this case were sufficient. Smith v. State, 249 Ga. 228, 229 (1982). Thus, even if Counsel should have submitted instructions to the Court, the failure to do so would be harmless as the Court gave sufficient instructions on its own.

In Paragraph 34(A) Petitioner alleges that Counsel failed to render effective assistance because he did not request a manslaughter instruction be included in the jury charge during the guilt/innocence phase of the trial.

Again, this topic has been developed more fully in the section of this Order dealing with paragraphs 62-63 (p. 23-25). The Court found that there was no requirement, given the evidence in this case, that a manslaughter instruction be given as a matter of law. The Court cannot find Counsel was ineffective for failing to request a charge for which there was no evidence.

Accordingly, the Court finds that there is no merit to the allegations of Petitioner presented in paragraphs 34, 34(A), 39, 40 and 41.

In Paragraphs 35 and 36, Petitioner alleges that during the sentencing phase Counsel failed to call some witnesses who were present at the courthouse and restricted the testimony of others. Counsel used three witnesses during the sentencing phase to testify to Petitioner's strange and unusual behavior. (H.T. 132). Whether or not other potential witnesses were available, it is a tactical decision of counsel as to what witnesses to present in what order. Reid v. State, 235 Ga. 378 (1975). Counsel states that, regardless of what is now claimed, at the time he talked with Petitioner's father the latter was unwilling to say that his son was acting strangely. (H.T. 130). In fact, he told Counsel immediately after the first phase of the trial that he did not want to testify. (H.T. 56-57). Counsel could not account for the apparent discrepancy presented by the affidavit. (H.T. 56).

Mr. Keeble testified that his restrictions on the testimony of witnesses so as to cover only certain areas were an effort to prevent so-called "good character" evidence which would have opened the door for the State to present counter-evidence. (H.T. 152).

Counsel had talked with the law enforcement officers who would have testified and decided that he did not want the jury to hear of Petitioner's prior conviction and imprisonment to which the officers would have testified. (H.T. 53). Counsel stated that it was his understanding that evidence of morality and work ethics was dangerous and could well allow the State to introduce adverse testimony. (H.T. 155). Once again the decision of what evidence the jury should and should not hear would have to be classified as trial tactics. The Court finds no merit in this allegation.

In Paragraph 37, Petitioner alleges that Counsel failed to object during the sentencing phase to prejudicial testimony about personal characteristics of the decedent. The Court has reviewed this testimony and, as stated elsewhere in this Order P 64-68 (p. 25-26) finds no error in its admission. Thus Counsel cannot be found ineffective for having failed to object. Accordingly, the Court finds the allegations set forth in Paragraph 37 to be without merit.

In Paragraph 38, Petitioner alleges Counsel failed to render effective assistance when he failed to object to the prosecutor's closing argument which was designed to appeal to passion and prejudice and made misleading statements about the only aggravating circumstance.

The Court has found elsewhere in the Order that the Prosecutor's closing argument was not so inflammatory and prejudicial as to violate Petitioner's constitutional rights. (P 69-70, p. 26-27). Accordingly, Counsel cannot have failed to provide effective assistance to Petitioner by failing to object, and this allegation must be found to be without merit.

In Paragraph 43, Petitioner alleges that Counsel failed to render effective assistance on appeal in that his brief consisted of

"canned arguments" which he further weakened in argument before the Supreme Court about the failure to define "mitigating circumstances" by an erroneous assertion, and that he failed to raise numerous legal issues.

The issues to be raised on appeal would be within the province of the attorney handling the appeal. Counsel raised a number of issues, many of which Petitioner's present counsel have reasserted in this habeas petition. That the omission of other possibly less effective allegations of error was allowed by trial counsel does not mean that he must be found constitutionally ineffective. Effectiveness is not measured by how another lawyer might have handled the case. Estes v. Perkins, 225 Ga. 268 (1969).

Likewise, the arguments used by a lawyer to support his contentions need not be identical to what would be used by every other lawyer. However, most lawyers seem to prefer to use grounds, especially on appeal, which have already been successful in previous cases. If the use of "canned arguments" constitutes ineffectiveness, then the Court fears that the vast majority of attorneys would have to be found ineffective. It seems to be far more demonstrative of the time and effort put forth by an attorney if he finds a previous case which supports his own arguments.

This Court has already found that the trial court's jury charge on mitigating circumstances was adequate and did not violate Petitioner's constitutional rights, (see Findings on Paragraphs 34, 34 (A), 39, 40 and 41, pp. 12-14), so any possible error in Counsel's argument to the Supreme Court on this issue could only be, at most, harmless error. The Supreme Court had the record of the case and conducts its own review of the facts.

The Court finds no evidence to support Petitioner's

contention that his Counsel on direct appeal failed to provide him with reasonably effective assistance at that stage of the proceedings. Accordingly, these allegations are found to be without merit.

44-51

In Paragraphs 44-51, Petitioner alleges that his post-arrest confession was extracted without a valid, knowing, voluntary and intelligent waiver (P 44-48). He also alleges that the confession was the result of an unnecessarily prolonged detention following his arrest and prior to being presented to a judicial officer or being appointed counsel (P 49-51). Petitioner claims that this violated his Fourth, Fifth, Sixth and Fourteenth Amendment rights under the United States Constitution.

FINDINGS OF FACT

The Court has reviewed the trial transcript and the record of the Jackson-Denno hearing (R. 86-108). The trial court found as a "matter of fact that the Petitioner's statement was freely and voluntarily made." (R. 108). Upon an examination of the testimony of the Sheriff and Deputy involved, this Court concludes that the facts support the trial court's finding. Both the Sheriff and Deputy Cartee state that Petitioner was read his rights, said he understood them and asked no questions. (R. 88, 89, 93, 103, and 106). They testified that Petitioner was alert, friendly and not under the influence of any alcohol or drugs (R. 88, 89, 94, 103, 104). Petitioner never requested an attorney either before or during the questioning. (R. 89, 93, 104, 105, 107). When asked, Petitioner said that he wanted to make a statement. (R. 93). There is no evidence that this was in response to any promises or coercion. To the contrary all testimony indicates that there were no threats or promises made and that the statement was freely given. (R. 93, 101, 104, 105, 106, 107). Petitioner gave his statement in a narrative form

(R. 99-100) and never asked the Sheriff that he be allowed to stop or that he not be questioned further without an attorney (R. 93, 95-96, 105, 107). Deputy Cartee wrote down the statement as Petitioner gave it and then read it back to him to assure its accuracy. (R. 94-95). Petitioner was then given the statement to look over. (R. 95, 99). Petitioner signed the statement after saying it was correct. (R. 95, 99). He also signed a shorter statement given in response to the Sheriff's question of why he had committed the offense. (R. 95, 99).

No new facts about Petitioner's circumstances immediately preceding the confession were added during the testimony at trial. Again, both the Sheriff and Deputy testified that Petitioner was alert and bright (T.T. 225), not under any drugs (T.T. 226), and willing to talk (T.T. 226). He was asked at least twice if he wanted an attorney and said no. (T.T. 226). They repeated that his statement was taken down, read back to him and shown to him prior to his signing it. (T.T. 227). Petitioner was cooperative, talked clearly without constant questioning and never requested that he be allowed to stop. (T.T. 232, 233).

Regarding Petitioner's allegation that his statement was the result of an illegally prolonged detention prior to being presented to a judicial officer or being appointed counsel, this Court has again reviewed the record for evidence to support the allegation. Petitioner was arrested about 11:30 P.M. on June 8th after turning himself in (T.T. 187). He was taken to the Clarke County Jail and booked, but was then left to rest until the next day (R. 96). No one questioned the Petitioner during the night of his arrest while he was exhausted. (R. 98). After he had had an opportunity to rest and eat (T.T. 270), the Sheriff and Deputy Cartee had the Petitioner brought to a small room

where he was read his rights and asked if he wanted to make a statement (T.T. 225, 226). Petitioner was asked at least twice if he wanted an attorney in addition to the reading to him of his constitutional rights. (T.T. 225, 226). On both occasions he said no he did not. (T.T. 226).

CONCLUSIONS OF LAW

The voluntariness of a statement must be judged by the statement and the totality of the circumstances surrounding the giving of the statement. (Jurek v. Estelle, 623 F.2d 929 (5th Cir. 1980)). In this case, the petitioner was arrested, read his rights, allowed to rest and eat to regain his strength, and then read his rights again prior to being questioned. At no time does the evidence indicate that the petitioner did not understand his rights. He did not ask any questions even when given time to rest and think after being arrested. He never asked for an attorney. He simply said he wanted to make a statement and proceeded to do so.

The Supreme Court of Georgia has ruled that showing that a defendant is illiterate and that he was placed in special education classes while in school does not, without more, show that he was incapable of understanding his Miranda rights when they were read to him. Donaldsen v. State, 249 Ga. 186 (1982). The fact that a defendant may have suffered from a mental deficiency or was illiterate would not render him capable of making a valid confession. Coversen v. State, 162 Ga. App. 497 (1982), Parker v. State, 161 Ga. App. 478 (1982), C.R.T. v. State, 148 Ga. App. 628 (1979).

In this case, there is no evidence of coercion or force to gain a confession. There is also no evidence other than some

testimony concerning his being slightly retarded to show that the Petitioner did not understand his rights when read to him. There was a delay in his being questioned, but the purpose was apparently to allow the Petitioner to rest and eat. It appears to this Court that the Petitioner would be far more likely to understand something when alert and comfortable and having had time to consider what he had been told. Had he been read his rights one time that night while exhausted and hungry, and then interrogated immediately, the chances of confusion would have been much greater.

Petitioner alleges in paragraph 51 as further support for his claim that his waiver and confession were the fruits of an unlawful detention that he was not taken before a judicial officer for his commitment hearing until July 3, 1981, following his arrest on June 8, 1981. The legality, duration and conditions of detention are matters relevant for a trial court to consider in determining if a statement is voluntary; it does not require as a matter of law that a confession be rendered inadmissible. Wilson v. State, 229 Ga. 395, 397 (1972). Failure to have a commitment hearing at all is not reversible error and does not automatically require a reversal of a conviction. State v. Middlebrooks, 236 Ga. 82 (1976). The time which elapsed prior to Petitioner's commitment hearing was one fact before the trial court when the determination was made that the statement given was voluntary and knowing. Furthermore it is questionable as to whether this argument is even applicable since Petitioner's statement was given approximately twelve hours after his arrest. At this point the detention was not unlawful as a commitment hearing is required only within forty-eight hours of a warrantless arrest (O.C.G.A. §17-4-62) or seventy-two hours of an arrest with a warrant (O.C.G.A. §17-4-26).

In Petitioner's case, a Jackson v. Denno hearing was held, and his statement was found to have been voluntarily and knowingly made. The facts of Petitioner's capabilities, the time of appointment of his attorney, the time of his commitment hearing and the facts surrounding his detention and confession were before the trial judge. Factual and credibility findings in regard to admissibility of a statement based on voluntariness made by a trial judge must be accepted by reviewing Courts unless such determinations are clearly erroneous. Hurt v. State, 239 Ga. 665(2)(1977). The state psychiatrist testified that Petitioner was aware of the charges against him, reasonably able to understand the legal process, understood the possible consequences of being found guilty and had the skills to communicate with an attorney. (T.T. 281-282). In light of this evidence as well as the care taken to inform Petitioner of his rights and to allow him time to recover from his exhaustion so as to be better able to "think straight", this Court does not find that Petitioner's statement was involuntary or unknowing, nor that it was the result of an unnecessarily prolonged detention.

Accordingly, the allegation in paragraphs 44-51 are found to be without merit.

52-58

In Paragraphs 52-58, Petitioner alleges that a death-scrupled juror was improperly excluded thus violating his Sixth, Eighth, and Fourteenth Amendment rights.

FINDINGS OF FACT

The Court has reviewed the individual, sequestered voir dire of veniremen about their views on capital punishment. (T.T. 91-131). Venireman Monk indicated there were no circumstances under which he would vote for the death penalty and was excused for cause. (T.T. 113-117).

CONCLUSIONS OF LAW

The Court finds that the prospective juror was not improperly excluded under Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

Petitioner has contended under Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), that the venireman was improperly excluded because Witherspoon is not a ground for challenging prospective jurors.

In Adams, the Supreme Court struck down a Texas statute which excluded jurors in a capital case inconsistently with Witherspoon. In rejecting the State's argument that the statute in issue and Witherspoon could coexist as separate and independent bases for excluding jurors, the Court stated that Witherspoon is not a ground for challenging prospective jurors. "It is rather a limitation on the State's power to exclude: if prospective jurors are barred from jury service because of their views about capital punishment on 'any broader basis' than inability to follow the law or abide by their oaths, the death sentence cannot be carried out." Adams, supra, 448 U.S. at 47-48. Here, the juror was not excluded on any basis broader than that permitted by Witherspoon.

The juror in question stated that his feelings were based on his religious beliefs, and that the crime itself would make no difference. (T.T. 115). He stated at least three times in response both to Counsel's efforts to rehabilitate him and to the Court's direct questions that he was conscientiously opposed to the death penalty and could not impose it. (T.T. 116).

Even though the juror was properly excluded under Witherspoon, Counsel did raise objection to his being excused and requested that he be allowed to remain as part of a "representative cross-section" of Petitioner's peers. (T.T. 116-117). It

appears that Counsel did everything possible to prevent the venireman's exclusion.

Accordingly, the allegation in Paragraphs 52-58 is found to be without merit.

59-61

In Paragraphs 59-61, Petitioner contends that he was denied his right to trial by a fair and impartial jury because eight jurors who served on the case knew the victim. He further alleges that the jurors were not asked if their relationships with the victim would affect their impartiality.

FINDINGS OF FACT

During voir dire, Counsel asked each panel of jurors whether their deliberations would be influenced by the fact, among others, that his client, a young black man, was accused of killing Mr. Dan. (T.T. 31; 44-45; 58-59; 71-72; 84). No veniremen responded to the questions.

CONCLUSIONS OF LAW

There are two types of challenges to an individual juror for cause: for principal cause and for favor. Jordan v. State, 247 Ga. 328, 338 (1981). Challenges for favor are based on admissions of the juror, or facts and circumstances raising a suspicion that the juror is actually biased for or against one of the parties. Id.

The victim in this case was an elderly man who had operated a small grocery store in a rural community for a number of years. Veniremen indicated that they knew or knew of the victim. No jurors indicated their knowledge would influence their deliberations. These facts, without more, are not sufficient to show that jurors may have been biased against Petitioner.

Accordingly, this allegation is found to be without merit.

62-63

In Paragraphs 62-63, Petitioner claims that the trial court's instructions on malice were impermissibly burden-shifting, and that the failure of the trial court to charge the jury on the offense of manslaughter violated his Fourteenth Amendment right to due process of law.

FINDINGS OF FACT

The Court has reviewed the instructions to the jury in the guilt/innocence phase. (T.T. 325-342). The Court has also reviewed the evidence presented in the case, particularly the testimony of Petitioner. (T.T. 285-299).

CONCLUSIONS OF LAW

The instruction with which Petitioner takes issue provides: "Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart."

Petitioner correctly states the law in Sandstrom v. Montana, (442 U.S. 510 (1979)), that a jury instruction on an essential element which can reasonably be understood by the jury either to erect a conclusive presumption upon the finding of certain facts, or to shift the burden of persuasion to the defendant is unconstitutional. However, a single instruction to the jury may not be judged in isolation but must be reviewed in the context of the overall charge. Cupp v. Naughten, 414 U.S. 141 (1973); Johnson v. State, 249 Ga. 812 (1982); Wells v. State, 247 Ga. 792 (1981).

The same malice charge as that given in Petitioner's trial (T.T. 336) has been held to not cause an unconstitutional burden-shifting when viewed in the context of the overall charge. Lamb v. Jernigan, 683 F.2d 1332 (11th Cir. 1982). The Court has reviewed the trial court's entire charge to the jury. (T.T. 325-342) and finds no violation of Petitioner's

constitutional rights by the creation of a conclusive presumption. Rather, the trial court appears to have been very careful to convey to the jury that the State was required to prove each individual element of each crime beyond a reasonable doubt. (T.T. 326, 327, 330, 339). It does not appear to this Court that any reasonable juror would infer a burden on Petitioner to prove a lack of malice given the trial court's instructions as a whole.

Petitioner has also claimed error from the failure of the trial court to charge on the lesser included offense of manslaughter. Under Georgia law, voluntary manslaughter is the killing of another human being under circumstances which would otherwise be murder and if the act is solely the result of a sudden, violent and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person. O.C.G.A. §16-5-2(a). Whether there is a slight evidence warranting a charge on voluntary manslaughter is a question of law for the courts to determine. Henderson v. State, 234 Ga. 827 (1975).

This Court, upon a review of the evidence does not find that Petitioner acted solely as a result of a sudden, violent and irresistible impulse. The Georgia Supreme Court has ruled that being discovered during the commission of a burglary is not as a matter of law such provocation as would require a charge on voluntary manslaughter. Horton v. State, 249 Ga. 871 (1982). Similarly the fact that a robbery victim put forth some minimal resistance to being robbed should not automatically provide such extreme provocation. In this case the Court finds that the evidence is not such as would require the giving of a jury charge on voluntary manslaughter.

As to involuntary manslaughter, the stabbing of another

being a felony, the trial court did not err in failing to give this charge. Williams v. State, 249 Ga. 6, 8 (1982); Cervi v. State, 248 Ga. 325, 329 (1981).

64-68

In Paragraphs 64-68, Petitioner claims that the admission into evidence of testimony from the victim's stepson during the sentencing phase violated his rights as guaranteed by Sections 2-101, 2-111 and 2-114 of the Georgia Constitution and the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

FINDINGS OF FACT

The victim's stepson, Robert E. Sanders, was included in the list of witnesses provided by the prosecution. (R. 137). The stepson testified during the guilt/innocence phase (T.T. 203-206) and in the sentencing phase. (T.T. 347-349).

CONCLUSIONS OF LAW

Petitioner has objected to the admission of the stepson's testimony concerning the victim during the sentencing phase. He argues that the testimony is irrelevant in that it concerned neither the offense nor offender so that its admission was an appeal to passion and prejudice.

The Court has reviewed the stepson's testimony in the sentencing phase. His testimony was unemotional and brief. The evidence complained of is very similar in nature to that approved of in Moore v. State, 240 Ga. 807, 818 (1978), and Corn v. Hooper, 244 Ga. 28, 29 (1979). The Court finds no error in its admission.

Accordingly, this claim for relief is found to be without merit.

69-70

In Paragraphs 69-70, Petitioner alleges that the prosecutor's closing argument, given during the sentencing phase, violated his rights as guaranteed by Sections 2-101, 21-111 and 2-114 of the Georgia Constitution and the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States in that it was a flagrant appeal to passion, prejudice, primitive vengeance and other arbitrary factors and was misleading as to the statutory aggravating circumstances at issue.

FINDINGS OF FACT

While this issue was not directly addressed on appeal to the Georgia Supreme Court, Petitioner did argue that his sentence was imposed under the influence of passion, prejudice and other arbitrary factors. Smith v. State, 249 Ga. 228, 233 (1982). Not only did the Supreme Court address the specific error alleged, the Court also made an explicit finding that "the sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factor." (Id.)

CONCLUSIONS OF LAW

In the statutorily mandated independent review of death sentences, the Supreme Court must determine whether or not the sentence of death "was imposed under the influence of passion, prejudice or any other arbitrary factor." O.C.G.A. §17-10-35(c)(1). In making this determination they examine the entire record for the presence of factors improperly impacting on the decision to impose a sentence of death. Conner v. State, 251 Ga. 113, Vol. 36 No. 31 GLR 83, 86 (1983). In its review of Petitioner's direct appeal, the Supreme Court

found expressly that the death penalty had not been unconstitutionally imposed under the influence of passion, prejudice, or other arbitrary factors. Smith v. State, 249 Ga. 228, 233 (1982). Implicit in this finding, given the compulsory nature of the review of the entire record, is the fact that the Supreme Court did not find any violation of Petitioner's constitutional rights in the prosecutor's closing argument.

Even if the finding on direct appeal were to not be applied, it has been held that neither the Eighth Amendment nor O.C.G.A. §17-10-35(c)(1) forbids a death penalty based in part on an emotional response to factors in evidence which implicate valid penological justification for the imposition of the death penalty. Conner v. State, supra at 90. This Court feels, on review of the record, that this holding would apply in this case.

Accordingly, the allegations in Paragraphs 69-70 are found to be without merit.

71-74

In Paragraphs 71-74, Petitioner claims that the trial court failed to guide the jury properly as to the O.C.G.A. §17-10-30(b)(7) (Ga. Code Ann. §27-2534.1(b)(7)) aggravating circumstance so that its imposition violates his Eighth and Fourteenth Amendment rights. (See also p. 13 of this Order.)

FINDINGS OF FACT

The Supreme Court has concluded that the evidence substantiates and supports the finding of the (b)(7) aggravating circumstance. Smith v. State, supra, at 234.

CONCLUSIONS OF LAW

Implicit in the finding of the Supreme Court is the conclusion that the jury's discretion was properly guided as

to the (b)(7) aggravating circumstance.

Accordingly, this allegation is found to be without merit.

75-82

In Paragraphs 75-82, Petitioner alleges that the trial court inadequately instructed the jury concerning mitigating circumstances so that his death sentence violates his rights under the Eighth and Fourteenth Amendments. (See also p. 13 of this Order).

FINDINGS OF FACT

The Supreme Court has already upheld the charge on mitigating circumstances. Smith v. State, supra, at 229(2).

CONCLUSIONS OF LAW

Findings of the Supreme Court are binding upon this Court for the purpose of review. Elrod v. Ault, 231 Ga. 750 (1974).

Accordingly, this claim for relief is found to be without merit.

83-85

The Supreme Court has already concluded that the (b)(7) aggravating circumstance was properly applied in this case. Smith v. State, supra, at 233(7).

86-90

The Supreme Court has already concluded that Petitioner's death sentence is not excessive or disproportionate. Smith v. State, supra, at 235.

91-97

In Paragraphs 91-97, Petitioner attacks the statutory provisions and practices governing appellate review of death sentences generally and as applied in his case.

Georgia's capital sentencing statute has been held constitutional. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

Accordingly, this allegation is found to be without merit.

98-101

Petitioner's allegation that the death sentence is being unconstitutionally applied is found to be without merit.

102-103

Petitioner's allegation that his death sentence is being exacted pursuant to a pattern and practice to discriminate on the basis of race, sex, and poverty is found to be without merit.

104-105

Petitioner's challenge to electrocution as the means of execution is found to be without merit.

WHEREFORE, the Court having found all allegations in the Petition to be without merit, this Petition is hereby denied.

This 16th day of April, 1984.

Hal Craig

HAL CRAIG
JUDGE, SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

Clerk's Office, Supreme Court of Georgia

ATLANTA 2/19/85

The motion for a rehearing ~~was~~ denied today:

Case No. 41276, 41504, Smith v. Francis, Warden

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk